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No. 01-531

Supreme Court, U.S.
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IN THE

Supreme Court of The United States

FARM & GROVE REALTY COMPANY,

Petitioner,

v.

BREVARD COUNTY, FLORIDA,
THE NATURE CONSERVANCY
and KEVIN JUDD,

Respondents.

On Petition for Writ of Certiorari to the Fifth District Court of Appeals for the State of Florida

RESPONDENT, BREVARD COUNTY'S BRIEF IN OPPOSITION

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JURISDICTION TO REVIEW

As discussed below, the reasons for review specified in the Petition fail to meet the criteria for the Court to exercise its certiorari discretion as specified in Rule 10(b) and (c), Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

With regard to the "Road Suit", the statement of the case presented by Farm & Grove Realty Company (F&G) is essentially correct. However, F&G failed to indicate that the trial court order dismissing Counts II through VII of the "Road Suit" expressly granted F&G leave to amend the complaint being dismissed. F&G also failed to point out that no amended complaint was ever filed in the "Road Suit" and that no final order of dismissal with prejudice was ever entered by the trial court. Moreover, F&G failed to note that the grounds for dismissal of the equal protection claim were not specified in either the trial court order or the Florida Fifth District Court of Appeal per curiam affirmation, although the trial court did note that the thrust of the "Road Suit" complaint was the "taking" issue.

STATEMENT OF THE FACTS

Brevard County does not entirely agree with the statement of facts presented by F&G, however, the County respectfully submits that the discrepancies are not germane to the County's argument that the petition fails to meet the review standards or jurisdictional requirements established for this Honorable Court, particularly since the first three issues raised by F&G pertain to an order dismissing the equal protection count in the "Road Suit" complaint, the allegations of which are deemed to be true for the purposes of reviewing the order granting the motion to dismiss. Those allegations are discussed in the text of the argument of the County's Point I. For the purposes of briefing points arguing against this Honorable Court's acceptance of discretionary review of the F&G petition, Brevard County will rely upon undisputed facts set forth in F&G's statement of facts. The County would reserve the right to point out any factual discrepancies in any future brief on the merits that might be required by this Honorable Court.

ARGUMENT FOR DENYING THE PETITION

I. F&G POINTS I, II AND III FAIL TO MEET THE DISCRETIONARY REVIEW STANDARDS SET FORTH IN RULE 10(b) AND (c) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

In order to warrant this Honorable Court's exercise of discretionary review of the equal protection issues raised in Points I, II and III of the petition, F&G must demonstrate that the standards set forth in Rule 10(b) or (c) of the Rules of the Supreme Court of the United States have been met. Subparagraph (b) of the rule requires a demonstration that the state court's decision conflicts with the decision of another state court on an important federal question. Subparagraph (c) requires a demonstration that the state court has decided an important question of federal law that has not been settled or in a way that conflicts with prior Supreme Court decisions. The petition fails to meet the standard of either subparagraph for several reasons.

First, neither the trial court order dismissing the equal protection count in the "Road Suit" nor the per curiam affirmation of that order by Florida's Fifth District Court of Appeal articulate a reason for denying the equal protection claim. Although the trial court order questions ripeness of the takings claim, the order is silent on the grounds for dismissing the equal protection claim. Likewise, the per curiam affirmed decision of the appellate court offers no rationale for the affirmation. Under Florida law, the per curiam decision of the Fifth District therefore falls within the decisional rule that an appellate judgment per curiam consisting of the one word "affirmed" does not reflect a decision that would interfere with settled principles of law rendered by Florida's other appellate courts. *South Florida Hospital Corporation v. McCrea*, 118 So. 2d 25 (Fla. 1960). Likewise, the Florida Supreme Court has held that there is no limit to the grounds that may prompt a per curiam affirmed opinion. *Newmons v. Lake Worth Drainage District*, 87 So. 2d 49 (Fla. 1956).

Under Florida law, the variety of reasons that may have prompted the Fifth District's per curiam affirmed opinion make it is impossible for this Honorable Court to determine whether the Fifth District decision conflicts with the decision of another state court [Rule 10(b)] or the "way" in which the per curiam opinion settles a question of federal law [Rule 10(c)]. Therefore the petition fails to demonstrate compliance with the standards guiding this Honorable Court's exercise of discretionary jurisdiction.

Second, assuming this Honorable Court finds that a per curiam affirmed opinion establishes a legal principle sufficient to satisfy the "decision" requirement of the rules, the decision upholding dismissal of the equal protection claim does not conflict with the decisions of either another state or of this Court since the well-settled decisional law governing the equal protection issue raised in this case would support the lower court's disposition of the matter.

This equal protection claim involved the application of an "unpaved road" ordinance to a single 1.5 acre tract of rural land which has "paper" access by easement but no physical access (AI-60, ¶3-5). Since the application of government regulations or policies to real property does not implicate a fundamental right, *Villas of Lake Jackson, Ltd. v. Leon County*, 884 F.Supp. 1544 (N.D. Fla. 1995), *affirmed* in *Villa of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir. 1991), to plead a cognizable equal protection claim for disparate treatment under the facts at bar, F&G must allege that (1) it has been intentionally treated differently from others similarly situated and (2) that there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1068 (2000).

F&G failed to plead either of these *Olech* elements in its original "Road Suit" and failed to amend the dismissed complaint to incorporate such allegations. Nowhere in the "Road Suit" complaint does F&G allege that it has received disparate treatment, much less intentionally disparate treatment. The complaint merely alleges, on its face and through attached exhibits incorporated in the complaint, that all homes constructed in Brevard County must be served by a county-approved road (AI-61, ¶8); that the County Commission directed its staff not to use the MSBU special assessment program to fund private development of any kind in undeveloped areas (AI-62, ¶12; AI-59, Ex. C); and that all owners of lots in undeveloped areas must comply with the requirements of the unpaved road ordinance (AI 62-63, ¶13; AI 54-58 subparagraph c). Not only can it be inferred from the allegations of the complaint that, like F&G, all owners of rural lots without physical access are treated the same under the applicable ordinances, there is a complete absence of any allegation of intentional disparate treatment specifically directed at F&G. The trial court's dismissal of the complaint with leave to amend was therefore supported by, not in conflict with, the prior decisions of this Court. *Village of Willowbrook, supra.*

Moreover, under the rational basis test applied by this Court in garden variety equal protection claims, classifications established through the application of a regulation or policy must be upheld against an equal protection challenge if they are rationally related to a legitimate governmental interest. *City of Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct.1591, 104 L.Ed.2d18 (1989); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d. 797 (1974). Under rational basis analysis, if there is any reasonably conceivable set of facts that could provide a rational basis for the classification, the ordinance creating the classification must be upheld. Moreover, it is the burden of the challenger to disprove every conceivable basis which might support the classification. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

The facts alleged on the face of the "Road Suit" complaint reveal two grounds for dismissal that substantiate the judgement of both state courts under the rational basis analysis of equal protection claims established by this Court. First, Ordinance 93-27, attached as Exhibit D to the complaint (AI 50-59), expressly states that the purpose of the ordinance was ". . . to expand the criteria for the uses of unpaved roads to allow limited growth in rural residential areas while preventing urban sprawl . . ." (A 50). The discouragement of the proliferation of urban sprawl is one of the expressly articulated state administrative rules applied to local government comprehensive plans under Florida's comprehensive planning statutes. *See, Home Builders and Contractors Ass'n of Brevard, Inc. v. Department of Community Affairs*, 585 So. 2d 965 (Fla. 1st DCA 1991). The ordinance restrictions on road construction in rural areas therefore, on their face, are rationally related to the legitimate state interest in discouraging the proliferation of urban sprawl.

Second, there is no allegation in the "Road Suit" complaint that F&G, to the exclusion of every other lot owner on the easement in question, was the only lot owner subject to Ordinance 93-27. In fact, by its terms, the ordinance applies to all owners of lots along the easement that serves F&G's single lot.

Finally, the County has no constitutional duty to establish a discretionary special assessment program that would charge abutting property owners a pro rata share of the cost for developing a road that would serve F&G's private, rural lot. The County's choice not to finance the cost to extend roads serving a single rural lot purchased without physical access is also rationally related to the legitimate state interest of discouraging urban sprawl.

In view of the foregoing, the rational basis justifying the County's actions appear on the face of the complaint thereby warranting dismissal by the trial court under equal protection principles already established by this Court. Therefore, F&G's complaint fails to meet the standards of Rule 10(b) or (c) since the lower court's decision conforms to this Court's existing decisions and the state court decision under review in this case does not involve any federal question that has not been already been settled by this Court.

Brevard County therefore respectfully submits that F&G has not met the standards for discretionary review established by this Honorable Court with regard to Points I, II and III.

II. F&G POINT IV FAILS TO MEET THE RULE 10(b) and (c) STANDARDS FOR DISCRETIONARY REVIEW.

F&G Point IV suffers from the same "per curiam" infirmity raised in the argument set forth in the County's Point I, above. Under Florida law, a per curiam affirmation without opinion does not reflect a decision that would interfere with settled principles of law rendered by Florida appellate courts. *South Florida Hospital Corporation v. McCrea*, 118 So. 2d 25 (Fla. 1960). Therefore F&G cannot show how the per curiam affirmation of the Fifth District Court of Appeal, without opinion, can be demonstrated to conflict with the decisions of another state court or with the decisions of this Court. Likewise, if the per curiam affirmation does not reflect a "decision" under principles of Florida law, F&G cannot credibly claim that such a per curiam affirmation "decides" an important question of federal law that is unsettled. F&G therefore fails to demonstrate compliance with Rule 10(b) and (c) of the Rules of the Supreme Court of the United States. Brevard County respectfully submits that discretionary review should therefore be denied.

Assuming the per curiam affirmation was reviewable and this Honorable Court was able to divine from that affirmation that the ripeness issue was the determining factor that prompted the Fifth District Court of Appeal to uphold a trial court order granting summary judgment in which the grounds for granting summary judgment were not even specified, F&G still fails to meet the standards for review established in Rule 10(b) and (c) because the ripeness doctrine is well-settled in prior "takings" cases decided by this Honorable Court. The federal ripeness doctrine focuses on the necessity to pursue state procedures for seeking just compensation prior to seeking a Fifth Amendment takings claim under 42 U.S.C.A. §1983. *Williamson County Regional Planning Commission v. Hamilton Bank of*

Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Florida's procedure for inverse condemnation requires a bifurcated proceeding in which the "takings" determination must first be made by the trial court and, if a taking is deemed to exist, a jury trial follows at which just compensation is determined. *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla. 1988) [in inverse condemnation suit, trial court decides whether taking has occurred and jury decides what is just compensation]. Since, under Florida law, a plaintiff whose property has allegedly been taken can seek just compensation by following this bifurcated procedure, it is well established under *Williamson County Regional Planning Commission* and its progeny that any Fifth Amendment takings claim cannot be pursued under 42 U.S.C.A. §1983 until the Florida procedure is exhausted.

Given the well-settled status of the federal ripeness doctrine, F&G's ripeness issue (Point IV) fails to meet the Rule 10(b) and (c) standards for discretionary review and Brevard County submits that such review should be denied.

III. THIS HONORABLE COURT LACKS JURISDICTION TO REVIEW F&G POINT V RELATING TO THE CONSPIRACY COUNT IN THE "TAKINGS SUIT". F&G POINT V ALSO FAILS TO MEET THE RULE 10(b) AND (c) DISCRETIONARY REVIEW STANDARDS.

F&G Point V relates to the summary judgment granted on the state civil conspiracy claim alleged as Count III of the "Takings Suit". This issue suffers from the same failings as the other issues raised in the F&G's petition, with regard to the lack of decisional status of a per curiam affirmed opinion, the satisfaction of the well-settled rational basis equal protection analysis and the availability of a state just compensation procedure that satisfies the well-settled federal ripeness doctrine, as previously argued in Brevard County Points I and II, above. The County incorporates its argument on those issues here and asserts that discretionary review of F&G Point V should also be denied for failure to satisfy the standards of Rule 10(b) and (c) of the Rules of the Supreme Court of the United States.

In addition, Brevard County would raise two other points. First, contrary to F&G's unsupported statement to the contrary at page 25 of the petition, Count III of the "Takings Suit" was plead as a civil conspiracy tort claim under state law and not as a 42 U.S.C.A. §1983 claim (AII-16). The jurisdiction of this Honorable Court under 28 U.S.C.A. §1257, as asserted by

F&G, does not extend to state tort claims since, under that jurisdictional statute, only a right, privilege, or immunity set up or claimed under the Constitution or statutes of the United States are reviewable. This Honorable Court therefore lacks jurisdiction to review the state court's disposition of the state civil conspiracy claim.

Second, F&G promotes a Rule 56 analysis of the order granting summary judgment on the conspiracy count (Petition p. 25). Rule 56 is a rule of federal civil procedure that does not govern the state trial court's disposition of the motions for summary judgment filed in that court. Consequently, F&G's attempt to seek this Honorable Court's review of the Fifth District Court of Appeal per curiam affirmation of the trial court's order under the Rule 56 standard is beyond the scope of the jurisdiction or discretionary review standards established for the Court.

CONCLUSION

For all of the foregoing reasons, Respondent, Brevard County, Florida, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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